SUPREME COURT, U. S.

In The

Supreme Court of the United States

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October Term, 1974

No. 74-1359

JEFFREY BENNETT,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

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TABLE OF CONTENTS

	Page
Statement	1
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provision Involved	3
A Summary of the Facts of the Case	3
Reasons for Granting the Writ	8
I. Petitioner was denied a fair trial in violation of the due process clause by virtue of the questioning and remarks of the Trial Judge who disparaged the fact that he was a college student and otherwise ridiculed some of his statements on the stand when he testified in his own behalf.	8
II. The questions by the prosecutor, of the petitioner when he took the stand in his own behalf, elicited the fact that he had been convicted, as a youthful offender, of a drug violation. The prosecutor, however, was seeking to establish a propensity to commit crime rather than merely seeking to impeach credibility. This violated due process of law.	19
Conclusion	22

TABLE OF CITATIONS

Page

Cases Cited:

Chapman v. California, 386 U.S. 18 18

Coppedge v. United States, 369 U.S. 438 21

Dugan v. Ohio, 277 U.S. 61 9

Frank v. Mangum, 237 U.S. 309 9

Gregory v. United States, 369 F.2d 185 20

Hodgson v. Rex, 18 C.A.R. 7 9

Lutwak v. United States, 344 U.S. 604 21

Jordan v. Massachusetts, 225 U.S. 167 9

Krulewitch v. United States, 336 U.S. 440 20

People v. Askew, 42 App. Div. 2d 717 14

People v. Roth, 30 N.Y. 2d 99 14

Rex v. Laubscher, 1926 A.D. 276 9

Screws v. United States, 325 U.S. 91 ..... 8, 22

Tumey v. Ohio, 273 U.S. 510 ..... 9, 18

Contents

	Page
United States v. Atkinson, 293 U.S. 157	22
United States v. Salazar, 293 F.2d 442 (2 Cir. 1961)	9
United States v. Wood, 252 F.2d 334 (2 Cir. 1958)	9
Wright v. State, Okl. Cr. App. 325 P.2d 1089 (1958)	20
Statutes Cited:	
28 U.S.C. §1257(3)	2
Criminal Procedure Law, Sec. 140.30-140.40	16
United States Constitution Cited:	
Fifth Amendment	2, 3
Fourteenth Amendment	2, 3, 8
APPENDIX	
Certificate Denying Leave	1a
Order on Appeal from Judgments of Conviction	2a

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STATEMENT

Petitioner, Jeffrey Bennett, petitions this Court for a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department, to review its determination rendered the 18 day of November, 1974, which reversed and dismissed the petitioner's conviction for possession of a blackjack, but which affirmed his conviction for felonious assault, second degree, modifying, however, his sentence to one of probation rather than one year's imprisonment.

OPINION BELOW

There was a short memorandum decision which is annexed to the petition herein.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The Court of Appeals of the State of New York denied leave to appeal on the 28 day of January 1975.

QUESTIONS PRESENTED

1. Whether petitioner was denied a fair trial in violation of the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution by virtue of the apparent bias and hostility of the Trial Judge?

2. Whether the fact that the prosecutor was permitted to question petitioner concerning a prior offense for possession of marijuana as a youthful offender tending to show a propensity toward criminality rather than impeaching credibility, deprived petitioner of a fair trial in violation of the due process clauses of the Fifth and Fourteenth Amendments?

3. Whether the petitioner was denied a fair trial in violation of the due process clauses of the Fifth and Fourteenth Amendments?

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The Fifth and Fourteenth Amendments of the United States Constitution are herein involved.

A SUMMARY OF THE FACTS OF THE CASE

The petitioner herein, Jeffrey Bennett, a college-age student, was jointly indicted with another youngster about his own age, Michael Kardonick, charged with assault second degree (felonious), and petitioner alone was also accused of possession of a blackjack.

The petitioner herein, sometimes called the defendant, appealed to the Appellate Division of the Supreme Court of the State of New York, Second Department, and succeeded in getting a reversal and dismissal of his conviction for possession of a blackjack, but the Court affirmed the conviction for felonious assault (second degree). Notwithstanding this fact, however, the Court reduced the sentence of one year to that of probation.

In reciting the facts, it is necessary to refer to both the defendants, namely Bennett and Kardonick, even though only Bennett is a petitioner herein. We therefore refer to them alternately as the defendants or the appellants, but we ask the Court to keep in mind that only Bennett is petitioning this Court for relief.

The *dramatis personae* in the case at bar are all college age students. The thrust of the indictment accuses the defendants

with having assaulted one Jay Zeitchik at about 11:30 P.M., or thereabouts, on the evening of March 2, 1973. Supposedly, a blackjack was possessed at that time by petitioner Bennett, since he alone was convicted of that charge as a misdemeanor along with the assault count of which both appellants were found guilty.

Notwithstanding the foregoing, a good deal of testimony was adduced of events involving an altercation among the alleged victim, Jay Zeitchik, and Samuel Melamedas, Eddie Senior, Keith Marshall, and David Bilbiuck. With the exception of Melamedas, the other youths were friends of Zeitchik.

Prior to the incident involving the alleged assault upon Zeitchik by the appellants herein, completely outside of the presence of Bennett and Kardonick, Zeitchik and his friends testified that for no apparent reason Melamedas took a hammer and broke the windshield of one of two automobiles operated by that quartet.

Melamedas, on the other hand, testified that he was assaulted by this foursome and was robbed of a quantity of money. He was chased by Zeitchik and his friends and ran to the home of Mr. and Mrs. David Lazerus.

Zeitchik admitted that he and his cohorts were shouting outside of the Lazerus' premises and wanted to get hold of Melamedas. It was conceded by the prosecution that Zeitchik, or another of this foursome, hurled a rock through the window of the Lazerus residence.

About the time that this rock was being hurled, the defendants-appellants were arriving at the Lazerus home in a small van and Bennett testified that it was Zeitchik who threw the rock.

At the time the appellants arrived at the scene, they observed the rock-throwing and heard Melamedas shout that Zeitchik had robbed him. Zeitchik and his cohorts started to run away and, according to the testimony of Bennett, who took the stand on behalf of appellants, they pursued him for the purpose of apprehending Zeitchik to hold him for the police.

It was during this period of time that the altercation occurred which gave rise to the instant case.

Bennett denied that any blackjack had been used, but testified that Zeitchik wielded a knife and, in fact, had thrown it at him.

The Court had interrogated Bennett during his examination in such a manner as to communicate to the jury an obvious disbelief in his testimony.

The District Attorney was permitted to cross-examine Bennett who only had a prior youthful offender conviction, not only with respect to the prior youthful offender conviction, but also was allowed to go into the details of the prior offense which involved possession of pills and marijuana, thereby tending to establish criminal propensity rather than impeach credibility.

In its charge, the Court, over objection, emphasized the fact that appellants were college students several times, admonishing

the jury that college students are just as libel under the criminal law as any other citizen.

Jeffrey Bennett, the petitioner herein, testified on behalf of the defense that he was 19 years of age and that his only prior conflict with the law was a youthful offender conviction for possession of pills and marijuana at age 16. He stated that he was a student at the University of Miami (601).* He declared that he knew Lazerus, Melamedas and Kaplan (602).

Bennett recalled that he had been invited to come to the Lazerus home on March 2nd to watch a concert and that he brought Kardonick with him in a van (611-612).

He observed Zeitchik throw a rock through the Lazerus window and pound on the door (612). When the van stopped, he heard Melamedas yell that Zeitchik and his friends had robbed him. At this point, Zeitchik and his pals ran away, pursued by Bennett and Kardonick.

When Bennett finally overtook Zeitchik, he stated that Zeitchik had a knife which he pointed at him (612-614). Bennett declared that he had accidentally hit Zeitchik in the head with a stick since he was trying to hit him in his hand so he would drop the knife (621).

Bennett testified that it was the intention of the appellants to apprehend Zeitchik to hold him for the police (622-623).

On cross-examination, the prosecutor was permitted to question appellant not only about the conviction of the youthful

*Numerals in parentheses refer to the trial transcript.

offender, but also to go into the substantive allegations of the charge and to cross-examine Bennett as if he were being tried for the possession of drugs. This is evident from the fact that the Court allowed petitioner to be questioned about the possession of the pills, from whom he purchased the pills, and who sold him the pills (623-627).

Bennett declared that he was struck by the police, but Detective Sanserverino, who allegedly struck Bennett, later testified and denied that he did (655, 676).

Appellant Kardonick did not testify. The Court's emphasis on college students, however, was prejudicial since there was no reason to single out that fact other than to inject prejudice into the case.

It is corroborative of the Judge's bias to note that at sentence the Court imposed a 1 year term despite the fact that at page 7 of the record, it had represented that if petitioner pled guilty, it would have recommended probation.

At the voir dire of the jury, the Trial Court required defense counsel to question jurors as a group and not individually.

REASONS FOR GRANTING THE WRIT

I.

Petitioner was denied a fair trial in violation of the due process clause by virtue of the questioning and remarks of the Trial Judge who disparaged the fact that he was a college student and otherwise ridiculed some of his statements on the stand when he testified in his own behalf.

Inasmuch as due process implies a tribunal both impartial and competent to afford a proper trial, it follows that the subjection of a defendant's liberty or property to the decision of a Court, the Judge of which is bias or not impartial, is violative of the Fourteenth Amendment of the United States Constitution.

As this Court stated:

> "Even those guilty of the most heinous offenses are entitled to a fair trial." *(Screws v. United States,* 325 U.S. 91, 107).

While, arguendo, it may not be a miscarriage of justice to convict a guilty man, if he is convicted in a way inconsistent with the fairness and integrity of judicial proceedings, then the Appellate Courts have an obligation to set aside that conviction. It is a function of this Court to make such reviews in its discretion. We of course maintain Bennett would not have been convicted except for the conduct of the Court and prosecutor.

See generally, *Tumey v. Ohio,* 273 U.S. 510.

See also, *Dugan v. Ohio,* 277 U.S. 61; *Frank v. Mangum,* 237 U.S. 309; and *Jordan v. Massachusetts,* 225 U.S. 167.

In *United States v. Salazar,* 293 F.2d 442 (2 Cir. 1961), Chief Judge Lumbard of the United States Court of Appeals made it very clear that where a Trial Judge injects himself into the trial and makes comments or asks questions designed to discredit or make ridiculous the defense of the party on trial, remedial action will be granted by the Courts in the form of a reversal.

See also, *United States v. Woods,* 252 F.2d 334, 336 (2 Cir. 1958).

In *Rex v. Laubscher,* 1926 A.D. 276 at p. 281, the Appellate Division of South Africa declared:

> "The second irregularity suggested was that the Judge put leading questions favorable to the Crown case, the answers to which questions being calculated to prejudice the accused. That might have been a serious allegation had the questions referred to been particularized. Because though a Judge has a certain latitude — as for instance in putting leading questions of an explanatory or supplementary nature — *Hodgson v. Rex,* 18 C.A.R. 7, *he is certainly not entitled to put leading questions, the answers to which are calculated to prejudice the prisoner."* (Emphasis ours.)

In the case at bar, two young men, both of college age, were on trial. The Court interjected itself in a number of instances having altercations and quarrels with defense counsel and also seeking to ridicule the testimony of petitioner when he took the stand in his own defense.

Perhaps the most dramatic outburst on the part of the Court occurred at page 421 of the record where the colloquy was as follows:

> "MR. PANZER: Right, judge! But may I ask a question?
>
> THE COURT: If you want to make a record, the record speaks for itself. If there's a conviction here and you're in the Appellate Division, you can say, 'Judge, at this point, I wanted to say to Judge Koota the following, and he didn't let me say anything.' Your record is protected.
>
> MR. PANZER: No, it's not on the record that I wanted to say something. I can't tell them at this point I wanted to say something. The record must reflect it, judge.
>
> THE COURT: *Then you take the position in the Appellate Division that if there's a conviction and if there's an appeal that I made an error in not permitting you to make a record. You must follow my instruction.*

MR. PANZER: I'll follow your instructions."

Again at page 181 of the record defense counsel insisted that he had to make a record and the Court blatantly declared that defense counsel was forbidden to make a record:

"MR. PANZER: I want to make an objection.

THE COURT: I don't want you to say anything.

MR. PANZER: *I have got to make record.*

THE COURT: *You will not make any record. You will ask a question.* I refuse to permit you to make any kind of a record with respect to the objects. Is that what you want to do?

MR. PANZER: Yes, your Honor.

THE COURT: *I refuse to allow you to make such a record.*

MR. PANZER: Respectfully except."

At page 194 of the record the Court refused to hold a side bar conference:

"MR. PANZER: At this time, your Honor may we have a side bar?

THE COURT: No.

MR. PANZER: If your Honor pleases, there is some pictures —

THE COURT: (Interrupting) I know there are some pictures. The District Attorney seems to be holding pictures in his hand.

MR. PANZER: I would like a side bar on that, Judge.

THE COURT: I won't permit any side bar conference. Go ahead Mr. District Attorney.

MR. PANZER: Your Honor, —

THE COURT: (Interrupting) *Don't say another word, please.*

MR. PANZER: I respectfully request a side bar out of the presence of the jury.

THE COURT: The application is denied."

With respect to protecting the record, it is clear that it is absolutely essential that when a defendant makes an objection that he should have a right to explain the thrust of that

objection. At pages 696 and 697 of the record defense counsel asked permission to explain his objection concerning a very important document going into evidence. The Court forbade defense counsel Panzer from saying anything other than "I object." Mr. Panzer retorted "*I must state the grounds for my objection. I respectfully except.*" He further declared "*You're hampering me in the conduct of this trial.*" The colloquy was as follows (696-698):

> "THE COURT: What do you say, Mr. Panzer? You've had your voir dire. Do you object to the document going into evidence?
>
> MR. PANZER: Your Honor, for the record, I feel that this objection should be made outside the presence of the jury so that the jury should not know the reasons I'm making this objection and if Your Honor informs me that I'm to, if Your Honor forces me to make it in the presence of the jury, I respectfully except and I'll make my objection in the presence of the jury.
>
> THE COURT: Yes. I don't require any arguments or statements. Just tell me if you object. If I require any reasons, I'll ask for them.
>
> MR. PANZER: Well, to make a record, I just got to show — there may be a possible later situation in this case.
>
> THE COURT: No, Mr. Panzer! I don't want you to make any statement other than 'I object!' Is that clear?

MR. PANZER: Your Honor, I must state the grounds for my objection. I respectfully except!

THE COURT: Yes, you have an exception.

MR. PANZER: You're hampering me in the conduct of this trial.

THE COURT: Am I? We're dealing with a question of law.

MR. PANZER: On the question of law, you're hampering me if the — judge, I'd like to pursue this trial as counsel advocate for these defendants —

THE COURT: No objection.

MR. PANZER: You're hampering me in the pursuance of this trial.

THE COURT: Mr. Panzer, you are a very experienced attorney. I will not permit you in the guise of attorney, to look over and look at the jury. I do know how a trial should be conducted, Mr. Panzer. *I'm asking you, do you object? I am directing you to say, 'I object,' 'I do not object,' or say nothing. I will not permit any argument as to the basis for your objection.* Now, is that clear? [*People v. Askew*, 42 App. Div. 2d 717, *infra. People v. Roth*, 30 N.Y.2d 99, 102, *infra.*]

MR. PANZER: Yes, that's clear, judge.

THE COURT: Now, do you object or do you not object?

MR. PANZER: I object under duress.

THE COURT: The objection is overruled. The Court has seen the profered exhibit and the exhibit will be received in evidence — People's 9 in evidence.

MR. PANZER: *At this time I respectfully move for a mistrial.*

THE COURT: Motion denied!

MR. PANZER: Exception!"

The Court, throughout the case, injected itself into the examination and cross-examination and, in many instances, argued and put down defense counsel. When petitioner Bennett testified, the Court belabored him in such a way as to communicate to the jury an apparent disbelief in the verity of the witness' testimony. Bennett, of course, was the only defendant who testified and it was certainly important that he be given every opportunity to explain his position.

Bennett declared that he had heard Melamedas shout that he had been robbed by Zeitchik and that later Zeitchik threw a knife at him. He stated that he and Kardonick were seeking to arrest Zeitchik. Although it was clearly a legal question and not

one of fact, the Court interjected itself and asked "*Did you know whether you had any right to apprehend him?*" Again, the Court said "*Well, you're not a policeman, are you?*" (622). It is, of course, elementary that a defendant or any other person has a right to effectuate a citizen's arrest for a felony. (See Sections 140.30-140.40 of the Criminal Procedure Law.)

The colloquy between the Court and Bennett. showing the adversary position taken by Justice Koota is as follows (622-623):

> "THE COURT: You said something about apprehending Mr. Zeichek. What does that mean?
>
> THE DEFT. BENNETT: Well, when Sammy had yelled out the window that he was robbed from these people, we had chased him not to beat him up, *but to apprehend him* which I'm meaning to mean as 'we.' *We wanted to get him and hold him until the police arrived.*
>
> THE COURT: *Well, you're not a policeman, are you?*
>
> THE DEFT. BENNETT: *No.*
>
> THE COURT: *Did you know whether you had any right to apprehend him?*
>
> MR. PANZER: *I must object to Your Honor's questions.*

THE COURT: *Overruled!*

MR. PANZER: Exception!

THE COURT: Did you know at that time whether you had any right to apprehend him?

THE DEFT. BENNETT: I was under the impression that anyone who wanted to apprehend a criminal has that right to apprehend him and hold him. I wasn't taking the law into my own hands; I was just holding him until the police got there.

THE COURT: All right, cross examine!"

In its charge however, the Court was even more prejudicial referring several times to the fact that petitioner was one of two college students on trial, indicating somewhat contemptuously that "college students are not an exempt class. They have to obey the law like anyone else has to obey the law."

Thus, at pages 797 to 798 of the trial record, the following was charged to the jury:

"The People of the State of New York contend here that these defendants have willfully violated the laws of the State of New York and anyone who willfully violates the law and commits a crime must be called to account for his transgressions and I mean ANYONE, and *college*

students are not an exempt class. Thye have to obey the law like anyone else has to obey the law. We're not dealing with a case where you read in the newspapers about *college* boys and girls running naked thru the streets. It isn't this type of a situation. We're not dealing with a case where *college* boys are engaging in some prank or something like that. The charges here are serious charges and *college* students must obey the law like everyone else must and the jury does not have a right to go out and say, 'Well, boys will be boys. They were just horsing around,' and so forth. There was a reference in the defendants' summation that this whole thing is a silly rotten mess but it isn't a silly rotten mess; it's a serious charge that has been brought here and it's serious to the People of the State of New York who are prosecuting and it is a serious charge to the defendants as well."

We recognize, of course, that within limits a judge has a right to ask questions and perhaps even to engage in colloquies with counsel, but we submit that the judge may not communicate to the jury, certainly not in a state case, a visible belief in the guilt or unbelievability of the person on trial. Such error cannot be regarded as harmless but is prejudicial as a matter of law. (*Chapman v. California,* 386 U.S. 18, 23; *Tumey v. Ohio, supra.*)

II.

The questions by the prosecutor, of the petitioner when he took the stand in his own behalf, elicited the fact that he had been convicted, as a youthful offender, of a drug violation. The prosecutor, however, was seeking to establish a propensity to commit crime rather than merely seeking to impeach credibility. This violated due process of law.

We have already detailed the serious prejudice created by the Court and prosecutor in this case with respect to curtailing proper examination and cross-examination of witnesses, coupled with the substantial interference of the defense by the Trial Court. There were sharp contradictions in the evidence between the defense witnesses and the prosecution witnesses. Thus it was extremely important that the trial be conducted with scrupulous fairness.

Unfortunately, the prosecutor, perhaps seeking to overtry his case, injected prejudicial error when he cross-examined the defendant Bennett who testified in behalf of the defense.

Bennett had apparently been convicted as a youthful offender of possession of certain pills and marijuana. Of course a youthful offender "conviction" does not constitute a criminal record in the traditional sense and it was over objection by defense counsel that the Court directed that Bennett could be questioned concerning this prior incident as a youthful offender.

While we are of the opinion that the Court could have exercised its discretion in keeping out such evidence since it had

no probative value in an assault case, where it could only serve to inject prejudice in the minds of the jurors, we nevertheless maintain that prejudicial error was created during the cross-examination of Bennett by the prosecution. The prosecution was permitted to ask about the possession of the pills and marijuana (623). The prosecutor was allowed to further question Bennett as to whether he had been taking pills.

Then, to exacerbate the prejudice, the prosecutor was authorized to inquire with respect to the drugs — *"Who did you buy it from?"*. This was followed by a whole series of questions concerning the purchases of the drugs, although obviously this could not be designed to impeach credibility, but only to inject prejudice and to make Bennett appear to be reluctant or evasive concerning a drug case which had already terminated in a youthful offender conviction, and which had nothing whatsoever to do with the instant assault prosecution. This was a prosecutorial *"harpoon"* which was hurled and such tactics have been rightly condemned.

In *Gregory v. United States,* 369 F.2d 185, referring to the case of *Krulewitch v. United States,* 336 U.S. 440 at 453, the device of using such insidious methods was disapproved in the following language:

> " . . . The volunteering of inadmissible testimony prejudicial to the defendant has been condemned time and again by both state and federal courts. For example, in *Wright v. State,* Okl. Cr. App. 325 P.2d 1089, 1093 (1958), where a law enforcement officer injected this type of

> prejudicial testimony, not twice as here, but only once, the court stated: 'This type of testimony has often been referred to as an "evidential harpoon" that has been wilfully jabbed into the defendants and then jerked out by an admonition to the jury not to consider the same. This court has never condoned, but often criticized a witness being intoxicated with eagerness in an all out effort to obtain a conviction. . . . .Officers must be aware that an overzealous attitude is, in most instances, detrimental to the prosecution and often results in a retrial of the case at considerable expense to the state'."

In *Coppedge v. United States,* 369 U.S. 438, this Court recently declared (*id.* at 449):

> "When society acts to deprive one of its members of life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without need for prompt, eminently fair, and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged."

It must also be borne in mind that this was not the type of case where there was overwhelming proof of guilt. It was a very close case at best. (*Lutwak v. United States,* 344 U.S. 604.)

We maintain that the integrity of the jurisdictional proceeding itself is at stake in this case. (*United States v. Atkinson,* 292 U.S. 157, 160.) The defendant was entitled to a fair trial (*Screws v. United States, supra*); he did not receive one.

CONCLUSION

The petition for certiorari should be granted and the judgment of conviction for assault second degree should be vacated.

Respectfully submitted,

s/ Irving Anolik
Attorney for Petitioner Bennett

APPENDIX

CERTIFICATE DENYING LEAVE

STATE OF NEW YORK COURT OF APPEALS

BEFORE: HON. MATTHEW J. JASEN, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

JEFFREY BENNETT and MICHAEL KARDONICK,

Appellants.

I, MATTHEW J. JASEN, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Buffalo, New York
January 28, 1975.

s/ Matthew J. Jasen
Associate Judge

*Description of Order: Order of Appellate Division, Second Department, rendered November 18, 1974, modifying two judgments of Supreme Court, Kings County, rendered March 20, 1974, and affirming as modified.

ORDER ON APPEAL FROM JUDGMENTS OF CONVICTION

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on November 18, 1974.

HON. JAMES D. HOPKINS, Acting Presiding Justice,
HON. M. HENRY MARTUSCELLO
HON. HENRY J. LATHAM
HON. J. IRWIN SHAPIRO
HON. JOHN P. COHALAN, JR. Associate Justices

The People of the State of New York,

Respondent,

v.

Jeffrey Bennett and Michael Kardonick,

Appellants.

In the above entitled action the above named Jeffrey Bennett and Michael Kardonick, defendants in this action, having appealed to this court from two judgments of the Supreme Court, Kings County, both rendered March 20, 1974, one convicting defendant Kardonick of assault in the second degree and the other convicting defendant Bennett of the same crime and also of possession of a weapon and dangerous instrument, upon a jury verdict, and imposing sentence; and the

Order on Appeal from Judgments of Conviction

said appeal having been argued by Irving Anolik, Esq., of counsel for the appellants and submitted by Steven Di Joseph, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the judgments appealed from are hereby modified, on the law and in the interests of justice, (1) by reversing the conviction and sentence of defendant Bennett for possession of a weapon and dangerous instrument and dismissing the count of the indictment upon which that conviction and sentence were based and (2) by reducing the sentences for the assault convictions to a term of five years probation; and, as so modified, the judgments are unanimously affirmed, and it is further

ORDERED that the case is hereby remanded to the Criminal Term for imposition of probation conditions.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division.